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IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

SOUTHWEST AIRLINES CO.,
Petitioner,
v.
PATRICK FENNESSY,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF *AMICI CURIAE* NATIONAL RAILWAY LABOR CONFERENCE AND AIRLINE INDUSTRIAL RELATIONS CONFERENCE IN SUPPORT OF PETITIONER

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BRIEF OF *AMICI CURIAE* NATIONAL RAILWAY LABOR CONFERENCE AND AIRLINE INDUSTRIAL RELATIONS CONFERENCE IN SUPPORT OF PETITIONER

The National Railway Labor Conference (NRLC) and the Airline Industrial Relations Conference (AIRCON) respectfully submit this brief as *amici curiae*. The written consent of all parties has been filed with the Clerk of this Court. The brief supports the petition for a writ of certiorari.

INTEREST OF THE *AMICI CURIAE*

The National Railway Labor Conference (NRLC) is an unincorporated association whose members comprise most of the nation's class I railroads. The NRLC represents member railroads in collective bargaining under the Railway Labor Act, on legislative matters affecting labor-management relations in the railroad industry, and in

administrative or judicial proceedings involving labor issues of general concern to member railroads. Its members transport over 90 percent of the nation's freight that moves by rail.

The Airline Industrial Relations Conference (AIRCON) is an unincorporated voluntary association of United States scheduled air carriers formed to facilitate the exchange of ideas and information concerning personnel and labor relations issues, and to represent its member carriers in those areas with respect to legislative, judicial and administrative matters. Its members include most major and national scheduled air carriers in the United States.

SUMMARY OF ARGUMENT

There are two "compelling reasons" under Supreme Court Rule 10 for granting certiorari in this case. First, the decision of several United States Courts of Appeals squarely conflict on the important federal question of whether, and under what circumstances, a federal court has jurisdiction over a union-represented employee's claim that his termination violates § 2, Fourth of the Railway Labor Act (RLA), 45 U.S.C. § 152, Fourth.[1] The Ninth Circuit stands alone in its recognition of such actions without limitation. The Third, Fifth and Seventh Circuits have recognized them only where the plaintiff's union is unable or unwilling to process a grievance on his behalf. The Second and Eighth Circuits have held that § 2, Fourth does not grant represented employees any implied right of action at all. The Court should resolve this conflict in order to foster uniformity in an important arena of labor-management relations in the railroad and airline industries.

Second, the Ninth Circuit's decision in the instant case squarely conflicts with *Cort v. Ash*, 422 U.S. 66 (1975), and its progeny. The Ninth Circuit found a private right of action under § 2, Fourth, without considering Congress' intent in enacting that provision. Application of the proper standard, in light of relevant Supreme Court prece-

[1] Unless otherwise specified, all statutory citations are to the RLA.

dent construing the RLA, compels a finding that the district court did not have jurisdiction over Fennessy's § 2, Fourth claim against Southwest.

ARGUMENT

I. THE DECISIONS OF SEVERAL UNITED STATES COURTS OF APPEALS SQUARELY CONFLICT ON THE IMPORTANT FEDERAL QUESTION OF WHETHER, AND UNDER WHAT CIRCUMSTANCES, FEDERAL COURTS HAVE JURISDICTION OVER A UNION-REPRESENTED EMPLOYEE'S CLAIM THAT HIS TERMINATION VIOLATES § 2, FOURTH OF THE RAILWAY LABOR ACT.

Section 2, Fourth guarantees to employees "the right to organize and bargain collectively through representatives of their choosing," and provides that the "majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purpose of this chapter." The section also prohibits carriers and their agents from

> deny[ing] or in any way question[ing] the right of its employees to join, organize, or assist in organizing the labor organization of their choice . . . [or] interfer[ing] in any way with the organization of its employees . . . [or] influenc[ing] or coerc[ing] employees in an effort to induce them to join or remain or not to join or remain members of any labor organization . . .

Courts construing the provision have taken mutually inconsistent positions with respect to whether, and under what circumstances, § 2, Fourth confers jurisdiction on federal courts to hear the discriminatory discharge claims of employees represented by unions.[2] In *Fennessy v.*

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[2] United States Courts of Appeals generally agree that federal courts have jurisdiction under § 2, Fourth to hear *unrepresented* employees' claims that they were discharged for engaging in union organizing activity. *See Stepanischen v. Merchants Dispatch Transportation Corp.*, 722 F.2d 922, 927 (1st Cir. 1983); *Robinson v. Pan American World Airways, Inc.*, 777 F.2d 84 (2d Cir. 1985); *Adams*

Southwest Airlines Co., 91 F.3d 1359 (9th Cir. 1996), the Ninth Circuit took the unique position that federal courts have jurisdiction over such claims without limitation. Other courts are divided, holding either that federal courts: (1) have jurisdiction over such claims only when the plaintiff either does not have recourse to an adjustment board, or such recourse is meaningless in light of a union's breach of its duty of fair representation;[8] or (2) lack jurisdiction over such claims under any circumstances.

It is not surprising that the Ninth Circuit stands alone in its expansive construction of § 2, Fourth's applicability to represented employees. As discussed in Part II, *infra* at 13-19, Congress' intent, as reflected in the structure and legislative history of the RLA up to the 1934 amendments, is incompatible with the Ninth Circuit's interpretation. Indeed, this Court recently emphasized that § 2, Fourth "address[ed] primarily the precertification rights and freedoms of unorganized employees." *Trans World Airlines, Inc. v. Independent Federation of Flight Attendants*, 489 U.S. 426, 440 (1989). The Ninth Circuit, on the other hand, did not even consider Congressional intent when it held that Fennessy had an implied private right of action under § 2, Fourth.

A. The Ninth Circuit Standard

The Ninth Circuit has adopted the most liberal interpretation of Section 2, Fourth. According to the *Fennessy* court, federal courts have § 2, Fourth jurisdiction over discriminatory discharge claims brought by individual employees, irrespective of whether the employee has ac-

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v. Federal Express, 547 F.2d 319, 321 (6th Cir. 1976), *cert. denied*, 431 U.S. 915 (1977); *Lebow v. American Trans Air, Inc.*, 86 F.3d 661, 663 n.1 (7th Cir. 1996); *Burke v. Compania Mexicana De Aviacion, S.A.*, 433 F.2d 1031, 1033 (9th Cir. 1970). The validity of those decsions is not challenged by Southwest's petition.

[8] Fennessy obtained the assistance of his union, and the grievance over his discharge was heard by a Systems Board of Adjustment. Fennessy did not raise a timely claim that his union breached its duty of fair representation in connection with his discharge.

cess to an adjustment board or whether a union breached its duty of fair representation in connection with the claim. 91 F.3d at 1364.

B. The Standard of the Third, Fifth and Seventh Circuits

The Third, Fifth and Seventh Circuits have recognized such a private right of action only under circumstances where the represented employee's union could not, or would not, process a grievance over the discharge. *See Brady v. Trans World Airlines Inc.*, 401 F.2d 87 (3d Cir. 1968), *cert. denied, sub nom. IAM v. Brady* and *Trans World Airlines v. Brady*, 393 U.S. 1048 (1969); *Roscello v. Southwest Airlines Co.*, 726 F.2d 217 (5th Cir. 1984); *Conrad v. Delta Air Lines, Inc.*, 494 F.2d 914 (7th Cir. 1974).

1. *The Third Circuit Standard*

In *Brady*, the plaintiff sued his employer for wrongful discharge, and his union for breach of its duty of fair representation. The plaintiff alleged that the union subjected him to a discriminatory dues obligation, and then, based on his alleged failure to pay dues, unfairly certified him as not in compliance with the union security provision of the applicable collective bargaining agreement. The employer terminated Brady upon receiving the certification. 401 F.2d at 90-91.

Following well settled Supreme Court precedent, the Third Circuit found district court jurisdiction to hear the employee's claim against his union for breach of its duty of fair representation. *Id.* at 93. *See Steele v. Louisville & N.R. Co.*, 323 U.S. 192 (1944) (holding employees have implied right of action under § 2, Third and Fourth to sue their union for breach of its duty of fair representation). In analyzing jurisdiction over the employer, the Court first observed that "plaintiff's controversy is primarily with his bargaining agent rather than his employer." *Brady*, 401 F.2d at 92. Nonetheless, the Court determined that the claim against the employer could go forward, reasoning:

> "If the District Court has jurisdiction to proceed against the union it is clear, we think, that it has also power to adjudicate the claim against the railroad. It would be absurd to require this closely integrated dispute to be cut up into segments."

Id. at 94-95, *quoting Cunningham v. Erie Railroad*, 266 F.2d 411, 416 (2d Cir. 1959). Thus, the court viewed its jurisdiction over the employer as flowing from its jurisdiction over the union. The Third Circuit's subsequent rejection of a *union's* § 2, Fourth claim highlights this distinction. *See International Association of Machinists & Aerospace Workers v. Northwest Airlines, Inc.*, 673 F.2d 700, 708 (3rd Cir. 1982) (observing that *Brady* "has little relevance to" claims "which involve disputes between a carrier and its employees.").

Northwest Airlines confirms the Third Circuit's restrictive view of the scope of a § 2, Fourth private right of action. There, the Court held that a federal district court lacked jurisdiction to hear a union's claim that numerous employer actions constituted an unlawful pattern of interference, harassment, and coercion in violation of § 2, Fourth. 673 F.2d at 703. In so finding, the Court distinguished cases in other circuits where *unrepresented* employees were held to have a private right of action under § 2, Fourth. The court reasoned:

> In these pre-certification cases, the employees could not grieve their discharges, because no bargaining representative had been designated or certified. As a result no collective bargaining agreement was in existence and no employees' dispute could be submitted to a Board of Adjustment because a Board had not been created.

Id. at 707.

The Court expressly *rejected* the district court's conclusion that "these cases, all of which involved pre-certification disputes, could be expanded to reach employer anti-union conduct after the employees had already designated a bargaining representative." *Id.* at 707 n.6. Rather, it held that "the language of Section 2 does no more than pro-

scribe interference or coercion that takes place *prior* to employee designation of a bargaining representative. Thus, Section 2, by its express terms, has no relevance to post-designation conduct." *Id.* (emphasis in original).

Despite this language, the Court did "not foreclose the possibility that given the appropriate case and the appropriate circumstances" a federal court could hear a *union's* claim that disciplinary measures taken by an employer were motivated by anti-union animus. *Id.* at 709. However, in outlining the jurisdictional predicate to such an action, the court again highlighted its narrow view of the scope of private rights of action implicit in § 2, Fourth; a union could not establish jurisdiction under § 2, Fourth without alleging "that the defendant is engaged in a general campaign or effort designed to destroy or undermine the union's representation of its members." 673 F.2d at 711.

2. The Fifth Circuit Standard

In *Roscello,* the plaintiff was discharged after the carrier recognized a union as representing his craft or class, but prior to a collective bargaining agreement between the new representative and the carrier. 726 F.2d at 219. After the company denied the plaintiff's grievance at the first step, he did not have the right to proceed to an adjustment board because the company "refused to discuss any more grievances with the [employee's union representative] in the absence of a collective bargaining contract." *Id.* The parties did "not question whether the plaintiff has a private right of action for wrongful discharge under the Railway Labor Act," and the Court expressly declined to decide the issue. *Id.* at 220 n.2.

A Fifth Circuit opinion predating *Roscello* suggests that the Court would have taken a more restrictive view of the employee's rights had he been represented by a union willing and able to process his grievance. *Brotherhood of Railroad Trainmen v. Central of Georgia Railway Co.*, 305 F.2d 605 (5th Cir. 1962), involved claims by both a union and an individual employee serving as a union agent that the carrier violated § 2, Third. The

carrier allegedly had threatened to discharge the employee for carrying out his representational duties, in order to influence and coerce the Trainmen craft or class in the choice or designation of their bargaining representative. 305 F.2d at 607. The court found that the *union* stated a cause of action, explaining:

> The purpose of the disciplinary hearing leading to a predetermined purpose to discharge [the employee/union agent] is to discredit him as well as the Brotherhood as bargaining representatives. The Railway Labor Act is equally broad. And certainly it is not so narrow that while it is at pains to secure an untrammeled *choice* of bargaining representative, a carrier would nevertheless be free to frustrate and undermine the effectiveness of such bargaining agent by securing his discharge for unfounded, false or baseless charges.
>
> • • • •
>
> If this is really the objective of the Railroad's plan, it is obviously a violation of the Railway Labor Act. As such, the Courts are open to grant appropriate injunctive relief.

305 F.2d at 608-09 (emphasis in original).

Despite this holding that the carrier's pretextual discharge of a bargaining agent constituted an actionable violation of the RLA, the court held that the *employee* had no "recourse to a court injunction to prevent the railroad from violating *his* rights simply as an employee . . ." 305 F.2d at 607 (emphasis in original). Thus, the court implicitly recognized that once employees are represented by a union, they must look to the union to ensure that the employer respects their representational rights, even when violation of those rights takes the form of adverse employment action against particular employees.

3. *The Seventh Circuit Standard*

Conrad, like *Brady*, was a hybrid duty of fair representation action against the union and a discriminatory discharge action against the employer. In addition, the employee, because of his probationary status, did not have

access to the Systems Board of Adjustment to challenge his discharge. As in *Roscello*, the court's jurisdiction was not disputed. 494 F.2d at 918.

C. The Standard in the Second and Eighth Circuits

At the other extreme, both the Second and Eighth Circuits have unequivocally held that Congress did not intend to give represented employees a right to sue for wrongful discharge in violation of the RLA. *Stack v. New York Central Railroad Co.*, 258 F.2d 739, 741 (2nd Cir. 1958) ("[T]he failure of Congress to spell out such a federal right of action should be taken to mean that no such right was intended."); *Smithey v. St. Louis Southwestern Railway Co.*, 237 F.2d 637, 638 (8th Cir. 1956) ("The right of a railroad employee to damages for a discharge, whether related to a labor agreement or otherwise, is a matter that has been left entirely to state contractual concept and remedy. . . . In other words, a railroad employee cannot claim damages for any discharge, except as the discharge constitutes an actionable one under the law of the applicable state.").[4]

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[4] The First Circuit also has never held that a federal court has jurisdiction to hear an employee's § 2, Fourth claim. Moreover, in the only case in which it addressed the issue, the Court held that it was "especially convinced of [its] obligation to deny federal court jurisdiction on the facts herein" in light of this Court's "pronouncement in *TWA v. IFFA* that the post-certification rights of unions under Section 2 Third and Fourth are narrowly circumscribed." *National Railroad Passenger Corp. v. International Association of Machinists and Aerospace Workers*, 915 F.2d 43, 51 (1st Cir. 1990). It further distinguished the plaintiff's allegations from an earlier case in which it recognized a *union's* right to sue under § 2, Fourth, based on "extraordinary union animus" demonstrated by the employer's having selectively abolished the jobs of 472 represented employees who had engaged in a lawful strike. 915 F.2d at 53 (discussing *Railway Labor Executives' Association v. Boston & Maine Corp.*, 808 F.2d 150 (1st Cir. 1986), *cert. denied*, 484 U.S. 830 (1987)). These cases suggest that the First Circuit would not recognize a cause of action under the circumstances of Fennessy's case.

D. Summary

The importance of the Court's resolving this conflict among the Courts of Appeals cannot be overstated. It is well settled that uniformity is essential in the arena of labor management relations. *See Burnett v. Gratton*, 104 S.Ct. 2924, 2931 n.14 (1984) (noting the "importance of uniformity in the labor law field"). This is particularly true with respect to the RLA, under which groups of employees working for interstate carriers and spread throughout the United States, routinely share a single bargaining representative. *See, e.g., Robinson*, 777 F.2d at 88. Employees represented by the same bargaining agent and working for the same employer should not have different rights of access to federal courts depending upon the federal judicial circuit in which they happen to be able to file an action most conveniently. Fennessy prevailed in the Ninth Circuit; he would have failed in the Second, Third, Fifth, Seventh and Eighth Circuits.

II. THE NINTH CIRCUIT IGNORED THIS COURT'S CONTROLLING PRECEDENT WHEN IT FAILED TO EXAMINE WHETHER CONGRESS INTENDED § 2, FOURTH TO CONFER A PRIVATE RIGHT OF ACTION ON REPRESENTED EMPLOYEES

A. The *Cort v. Ash* Principle

Relying upon its decisions in *Burke*, *supra* note 2, and *Arcamuzi v. Continental Air Lines, Inc.*, 819 F.2d 935 (9th Cir. 1987), the *Fennessy* court held that § 2, Fourth created a private right of action for represented employees, without considering Congress' intent in enacting the provision. *See* 91 F.3d at 1364 n.2.

In *Burke*, the Ninth Circuit had held that an *unrepresented* employee had a private right of action under § 2, Fourth, reasoning that "[i]n the absence of a clear congressional intent to the contrary, the courts are free to fashion appropriate civil remedies based on the violation of a penal statute where necessary to ensure the full effectiveness of the congressional purpose." 433 F.2d at 1033.

The *Arcamuzi* court merely followed *Burke*, without undertaking any independent analysis. 819 F.2d at 936.[5]

The standard applied in *Burke* was overruled in *Cort v. Ash*, 422 U.S. 66 (1975), in favor of one requiring an examination of congressional intent. Moreover, since *Cort*, this Court has repeatedly emphasized the centrality of congressional intent in deciding whether the proscriptions of federal statutes give rise to private rights of action. Application of the proper standard, in light of relevant Supreme Court precedent construing the RLA, compels a finding that the district court did not have jurisdiction over Fennessy's § 2, Fourth claim against Southwest.

This Court recently articulated the standard applicable to determining whether to infer a private right of action from a federal statute:

> [O]ur focal point is Congress' intent in enacting the statute. As guides to discerning that intent, we have relied on the four factors set out in *Cort v. Ash*, along with other tools of statutory construction. . . . Congress' "intent may appear implicitly in the language or structure of the statute, or in the circumstances of its enactment." The intent of Congress remains the ultimate issue, however, and "unless this congressional intent can be inferred from the language of the statute, the statutory structure, or some other source, the essential predicate for implication of a private remedy simply does not exist."

Thomson v. Thomson, 484 U.S. 174, 179 (1987) (citations omitted), *quoting Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 18 (1979), *and Northwest Airlines, Inc. v. Transport Workers of America, AFL-CIO*, 451 U.S. 77, 79 (1981).

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[5] Moreover, in *Arcamuzi*, although the plaintiffs—returning strikers who objected to taking polygraph exams—were represented by a union, the employer had withdrawn its recognition of the union prior to the strikers' return. As a result, the *Arcamuzi* plaintiffs would not have had access to a Systems Board of Adjustment, and were, for practical purposes, unrepresented. *See Airline Pilots v. O'Neill*, 499 U.S. 65, 68 (1991).

The four factors set out in *Cort* are: (1) whether the plaintiff is one of the class for whose "especial benefit" the statute was enacted; (2) whether there is any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one; (3) whether it is consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff; and (4) whether the cause of action is one traditionally relegated to state law, in an area basically the concern of the States. *See Cort*, 422 U.S. at 78. *See also Northwest Airlines*, 451 U.S. at 91 ("Factors relevant to this inquiry [into whether Congress intended to create a private remedy] are the language of the statute itself, its legislative history, the underlying purpose and structure of the statutory scheme, and the likelihood that Congress intended to supersede or to supplement existing state remedies.")

In recent years, this Court has held that the four factors articulated in *Cort* are not to be given equal weight in determining whether Congress intended to create a private right of action. In particular, the Court has emphasized the preeminence of the structure and purpose of the legislative scheme allegedly creating the right of action.[6]

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[6] *See, e.g., Massachusetts Mutual Life Insurance Co. v. Russell*, 473 U.S. 134, 145 (1985) (refusing to imply private remedy under Employee Retirement Income Security Act, even though plaintiff was a member of the class for whose benefit the statute was enacted and the action would not have encroached on state law, because "legislative intent and consistency with the legislative scheme—point in the opposite direction"); *Transamerica Mortgage Advisors*, 444 U.S. at 24 ("Section 206 of the Act here involved concededly was intended to protect the victims of the fraudulent practices it prohibited. But the mere fact that the statute was designed to protect advisers' clients does not require the implication of a private cause of action for damages on their behalf.").

B. Application of *Cort* to Section 2, Fourth

Although § 2, Fourth was clearly intended to protect unrepresented employees, the structure, purpose and legislative history of the RLA conclusively establish that Congress did not intend § 2, Fourth to create a private right of action in favor of represented employees.

1. *The Language of the 1934 Amendments*

The analysis of congressional intent "must begin with the language of the statute itself." *Touche Ross & Co. v. Redington, Trustee,* 42 U.S. 560, 568 (1979). Section 2, Fourth guarantees to employees "the right to organize and bargain collectively through representatives of their choosing" and provides that the "majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purpose of this chapter." The section also prohibits carriers and their agents from

> deny[ing] or in any way question[ing] the right of its employees to join, organize, or assist in organizing the labor organization of their choice . . . [or] interfer[ing] in any way with the organization of its employees . . . [or] influenc[ing] or coerc[ing] employees in an effort to induce them to join or remain or not to join or remain members of any labor organization . . .

Section 2, Ninth creates a mechanism whereby the majority of employees may designate their choice of a bargaining representative. The National Mediation Board is responsible for administering that mechanism, and for ensuring that representatives are chosen "in such a manner as shall insure the choice of representatives by the employees without interference, influence, or coercion exercised by the carrier." These are the very same rights crated by § 2, Fourth, and this Court has recognized that § 2, Ninth was intended to "protect[]" the § 2, Fourth right of employees to determine their representative free from carrier interference, influence or coercion. *Switch-*

men's Union of North America v. National Mediation Board, 320 U.S. 297, 300 (1943). As the *Switchmen's* Court explained:

> The Act in § 2, Fourth writes into law the "right" of the "majority of any craft or craft of employees" to "determine who shall be the representative of the craft or class for the purposes of the Act." That "right" is protected by § 2, Ninth which gives the Mediation Board the power to resolve controversies concerning it . . .

320 U.S. at 300-01.

In addition, the 1934 amendments to the RLA also empowered the Attorney General of the United States to seek criminal sanctions against employers who violate § 2, Fourth. *See* § 2, Tenth. These criminal sanctions include fines of up to $20,000 for each day of violation. Section 2, Tenth has rarely been invoked. *See Robinson*, 777 F.2d at 86. However, at the time the 1934 amendments were passed, Congress could not have known that. Indeed, Congress could reasonably have concluded that the mere threat of fines of $20,000 a day—a huge amount of money during the depth of the Great Depression—would be sufficient to ensure compliance with § 2, Fourth.

Congress' provision for alternate means of enforcing § 2, Fourth is strong evidence of its intent not to permit private rights of action under the clause. For

> [i]t is also an "elemental canon" of statutory construction that where a statute expressly provides a remedy, courts must be especially reluctant to provide additional remedies. In such cases, "in the absence of strong indicia of contrary congressional intent, [courts] are compelled to conclude that Congress provided precisely the remedies it considered appropriate.

Karahalios v. National Federation of Federal Employees, Local 1263, 489 U.S. 527, 533 (1989) (citations omitted), *quoting, Middlesex County Sewerage Authority v. Sea Clammers*, 453 U.S. 1, 15 (1981).

Moreover, the presumption is particularly strong under the RLA, where Congress has created a "comprehensive framework for the resolution of labor disputes in the railroad industry . . . [through] elaborate administrative procedures for the resolution of both major and minor labor disputes." *Atchison, Topeka & Santa Fe Railway Co. v. Buell,* 480 U.S. 557, 562 (1987). "The presumption that a remedy was deliberately omitted from a statute is strongest when Congress has enacted a comprehensive legislative scheme including an integrated system of procedures for enforcement." *Northwest Airlines,* 451 U.S. at 97. As this Court held in *Switchmen's*:

> Congress for reasons of its own decided upon the method for the protection of the 'right' which it created [under § 2, Fourth]. It selected the precise machinery and fashioned the tool which it deemed suited to that end. . . . All constitutional questions aside, it is for Congress to determine how the rights which it creates shall be enforced. In such a case the specification of one remedy normally excludes another.

301 U.S. at 301.

2. *The Legislative History of the RLA*

The legislative history of the Act through the 1934 amendments also indicates that Congress would not have created a federal right of action under § 2, Fourth without expressly so stating. The 1934 amendments represented one additional step in the Act's history of a piecemeal expansion of the jurisdiction of federal courts and arbitrators to resolve disputes between carriers and their employees.

Congress first addressed the problem of union-management relations in the railroad industry through the Transportation Act of February 28, 1920. As explained in *Virginia Ry. Co. v. System Federation No. 40,* 300 U.S. 515 (1937), the Transportation Act "set up the Railroad Labor Board as a means for peaceful settlement, by agreement or by arbitration, of labor controversies

between interstate carriers and their employees." 300 U.S. at 542. However, the decisions of the Board were supported by no legal sanctions, and as a result its authority was generally not recognized or respected by the railroads or their employees. *Id.*

Congress sought to address the perceived weakness of the Transportation Act by enacting the Railway Labor Act of 1926. As explained by the *Virginia Railway Co.* Court:

> By the new measure Congress continued its policy of encouraging the amicable adjustment of labor disputes by their voluntary submission to arbitration before an impartial board, but it supported that policy by the imposition of legal obligations. It provided means for enforcing the award obtained by arbitration between the parties to labor disputes.

300 U.S. at 542-43.

After passage of the RLA, the enforceability of arbitration awards facilitated the resolution of disputes between carriers and their employees under circumstances where "there was no dispute as to the organizations authorized to represent the employees." *Id.* at 545. However, it also became clear that those circumstances were often not present because of "the maintenance by the railroads of company unions and the denial of railway management of the authority of representatives chosen by their employees." *Id.* at 545-46, *citing* Report of House Committee on Interstate and Foreign Commerce, No. 1944, 73rd Cong., 2nd Sess., at 1-2 (1934).

As a result, the 1934 amendments, including § 2, Fourth, were principally intended to address the problem of railroads interfering with employee efforts to choose their representatives. As this Court recently explained:

> Section 2 Fourth was enacted as part of the 1934 amendments to the RLA. 48 Stat. 1185. From the time of our very first opportunity to interpret the 1934 amendments, we have viewed them as address-

> ing primarily the precertification rights and freedoms of unorganized employees.
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> • • • •
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> The explanation for the precertification focus of the 1934 amendments is clear. The RLA provides an exhaustively detailed procedural framework "to facilitate the voluntary settlement of major disputes." The effectiveness of these private dispute resolution procedures depends on the initial assurance that the employees' putative representative is not subject to control by the employer and on the subsequent assurance that neither party will be able to enlist the courts to further its own partisan ends.

Trans World Airlines, Inc., 489 U.S. at 440-41 (citations omitted), *quoting Trainmen v. Jacksonville Terminal*, 394 U.S. 369, 378 (1969). *See also Virginia Railway Co.*, 300 U.S. at 546 ("Section 2, Ninth, of the amended act (45 U.S.C.A. § 152, subd. 9) was specifically aimed at this practice [of railroads maintaining company unions]. It provided a means for ascertaining who are the authorized representatives of the employees . . .").

Moreover, this Court has long recognized that Congress' focused and piecemeal expansion of judicial and administrative jurisdiction under the RLA evidences its intent to confer such jurisdiction only to the extent expressly set forth in the Act:

> Until the 1926 Act the legal sanctions of the various acts had been few. The emphasis of the legislation had been on conciliation and mediation; the sanctions were publicity and public opinion. Since 1926 there has been an increasing number of legally enforceable commands incorporated into the Act. And Congress has utilized administrative machinery more freely in the settlement of disputes. But large areas of the field still remain in the realm of conciliation, mediation and arbitration. On only a few phases of this controversial subject has Congress utilized administrative or judicial machinery and invoked the compulsions of the law. . . . Congress intended to go

> no further in its use of the processes of adjudication and litigation than the express provisions of the Act indicate.

Switchmen's, 320 U.S. at 302.

In stark contrast to the historical evidence of Congress' intent to protect the rights of unrepresented employees through § 2, Fourth, there is no basis in the history of the 1934 amendments to impute to Congress an intent to permit individual employees to pursue claims against their employer after the certification of a bargaining representative. The System Boards of Adjustment required to be established by Title II of the RLA serve that purpose.[7]

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[7] A represented employee's claim that he was terminated in violation of § 2, Fourth would be within the jurisdiction of an adjustment board. This Court recently reaffirmed that claims which may be conclusively resolved by interpreting an applicable collective bargaining agreement are "minor disputes" subject to adjustment board jurisdiction. *Hawaiian Airlines, Inc. v. Norris*, 114 S.Ct. 2239, ——, 129 L.Ed. 2d 203, 213 (1994).

In *Norris*, the Court held that an employee's state law wrongful discharge claim was independent of the applicable collective bargaining agreement, because its resolution under Hawaii law required "only the purely factual question into *any* retaliatory motive of the employer." 129 L.Ed. at 220. By contrast, courts that have permitted *§ 2, Fourth claims* to go forward have analyzed their merits under the burden shifting analysis used by the National Labor Relations Board to adjudicate alleged violations of 29 U.S.C. § 158(a)(3). *See, e.g., Lebow*, 86 F.3d at 665-66. Under that analysis, an employment action that is motivated by *any* anti-union animus is not unlawful, provided the employer would have taken the same action irrespective of the unlawful motive. *Id.*

Unlike a claim satisfied by a showing of *any* unlawful motive, a claim under the § 2, Fourth burden shifting analysis would be dependent on the collective bargaining agreement. By definition, an employee who has been terminated for "just cause"—or, as was found by the Adjustment Board hearing Fennessy's grievance, "proper cause"—could not show that he would not have been terminated *but for* his union activities.

Moreover, arbitrators routinely consider an employer's past history of disciplinary rule enforcement in determining whether particular discipline is appropriate under the terms of a collective

Other purposes of the RLA woud *not* be served by recognizing Fennessy's claim. Permitting represented employees to prevent the swift adjudication of their employment grievances by opting for the slow processes of the federal courts is not compatible with the RLA's purpose of "providing effective and efficient remedies for the resolution of railroad-employee disputes arising out of the interpretation of collective bargaining agreements . . . [and] secur[ing] the prompt, orderly and final settlement of grievances." *Union Pacific R. Co. v. Sheehan*, 439 U.S. 89, 94 (1978).

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bargaining agreement. Any discharge which discriminated against an employee by being inconsistent with the employer's past treatment of similarly situated employees would not be for cause. *See, e.g., King Scoopers Inc. and Food & Commercial Workers, Local 7*, 101 L.A. 107 (1993) (holding discharge of employee was without cause where it was for violation of work rule that had been inconsistently enforced in the past); *TRW Inc. and Auto Workers, Local 2400*, 102 LA 348 (1994) (overturning three day suspension for one-day absence because penalty was inconsistent with past practice). As a result, there need be no concern that a carrier could successfully enforce a discharge which, although permissible under the letter of an agreement, was in fact pretextual.

CONCLUSION

The Court should grant certiorari to resolve the conflict among United States Courts of Appeals concerning the important question of whether represented employees have an implied private right of action under § 2, Fourth of the RLA. Until the conflict is resolved, employees of the same carrier will, for practical purposes, have divergent procedural rights to redress perceived violations of § 2, Fourth, depending upon the fortuity of their geographic location. In addition, the Court should act to ensure that congressional intent, and not a single court's view of what is salutary, shall govern the scope of remedies permissible under the RLA.

Respectfully submitted,

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